In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1277

FREDERICK COLLINS FERMIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

On March 29, 1941 petitioner was inducted into the United States Army, from which he was honorably discharged on September 17, 1945. On May 29, 1946, he enlisted in the Regular Army Air Force with the rank of Staff Sergeant. He was honorably discharged, after he was found by a board of physicians to be disabled, with a Certificate of Disability for Discharge on February 5, 1947, at which time he was transferred to a Veterans Administration facility. He was declared mentally incompetent by a Texas court in January 1947, and the same court declared his competency restored a year later. Petitioner was employed by the federal government from July 1950 to September 1957, at which

263-041—67

time he retired because of disability. In 1965 petitioner applied to the Air Force Board for Correction of Military Records, seeking to be placed on the retirement list pursuant to the Career Compensation Act of 1949, 63 Stat. 802, 10 U.S.C. 1201, *et seq.* His application was denied on April 20, 1965.

On September 28, 1966, petitioner brought suit in the Court of Claims alleging that the Air Force "committed Tort by denying Plaintiff's rights for formal application for Retirement" and seeking an "order to place Plaintiff on retirement with Compensation from date of the Career Compensation Act of 1949." The Court of Claims dismissed petitioner's action for failing to state a claim within the jurisdiction of the court, and petitioner now seeks review of that decision.

1. At the time of petitioner's discharge in February 1947, there was no provision which would have permitted disability retirement of enlisted men with less than 20 years of service.[1] The Career Compensation Act of 1949, 63 Stat. 802, *et seq.*, for the first time permitted disability retirement of enlisted men with less than 20 years' service, but provided, in Section 533(a), 63 Stat. 841, that, except for certain exceptions not here relevant—

> * * * this Act shall become effective on October 1, 1949, and no pay, allowances, or benefits provided herein shall accrue to any person for any period prior thereto.

[1] The Act of June 30, 1941, 55 Stat. 394, provided for the disability retirement of enlisted men with 20 or more years of service. The Act of May 4, 1945, 59 Stat. 135, gave disability benefits to enlisted men with 20 or more years of service who became disabled prior to the effective date of the 1941 Act.

The provisions of the 1949 Act upon which petitioner appears to rely apply only to members on active duty or members retired by reason of disability who were receiving, or were entitled to receive, retired pay on the effective date of the Act. Since there was no provision at the time of petitioner's discharge for the disability retirement of enlisted men with less than 20 years service, petitioner was not—and is not now—entitled to disability retirement pay.

2. Even if petitioner's contentions regarding the 1949 Act were correct, his suit would still not set forth a claim within the Court of Claims' jurisdiction. In the court below, petitioner's theory was that the government "committed Tort by denying Plaintiff's rights for formal application for Retirement" (Petition in the Court of Claims, p. 2). By statutory command, however, the original jurisdiction of the Court of Claims extends only to claims "not sounding in tort" 28 U.S.C. 1491. Cf. *Schillinger* v. *United States,* 155 U.S. 163; *Fort Sill Gardens, Inc.* v. *United States,* 355 F. 2d 636 (Ct. Cl.). And, even if petitioner's claim is viewed as a contractual one, or as a claim grounded upon an Act of Congress, it is barred by the six-year statute of limitations in the Tucker Act, 28 U.S.C. 2501. The essence of petitioner's complaint is the action of the Army Air Force in discharging him in 1947. A suit instituted in 1966 challenging this action was certainly time-barred. And even assuming, *arguendo,* that petitioner's asserted cause of action did not accrue until the

enactment of the Career Compensation Act of 1949, it would in that event also be out of time.[2]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

[2] Under settled principles, petitioner's cause of action cannot be considered to have arisen upon the later adverse determination of the correction board. See, *e.g.*, *Friedman* v. *United States*, 310 F. 2d 381, 390 (Ct. Cl.), certiorari denied *sub nom. Lipp* v. *United States*, 373 U.S. 932. Nor is his claim a "continuing" one in the sense used by the Court of Claims. See *Friedman* v. *United States*, *supra*, 310 F. 2d at 385; *Diamond* v. *United States*, 344 F. 2d 703, 706–707 (Ct. Cl.).

U.S. GOVERNMENT PRINTING OFFICE: 1967